IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4732 OF 2004

Shri.Dadu Devman Ahire ...Petitioner
V/s.
Smt.Vimalabai Kisan Ahire ...Respondent

Shri.R.M. Rohidas i/b P.N. Joshi for the Petitioner.
Shri.M.M. Sathaye for respondent.

CORAM : A.P. DESHPANDE, J.

DATED : 23rd NOVEMBER, 2006.

P.C. :-

1. Respondent/plaintiff instituted a suit for specific performance of contract. Initially summons was tried to be served by regular process through Belief. However as the summons was returned unserved, respondent/plaintiff preferred an application alongwith his affidavit praying for effecting substituted service under Order 5 Rule 20 of the Civil Procedure Code. Court, however, passed order of issuing the suit summons by RPAD and on receipt of acknowledgment, suit was ordered to be proceeded ex-parte. The proceedings culminated in passing of ex-parte judgment and decree dated 18/12/1990 in favour of the respondent/plaintiff and thereafter, respondent/plaintiff filed regular Darkhast for execution of the

decree bearing No.22/91. Present petitioner/defendant was in Central Jail during the period in between 15/3/1991 to 18/8/1992 and hence service of notice in Registered Darkhast No.22/91 was served on the petitioner/ defendant through the Superintendent of Jail by RPAD. It appears that after release of the petitioner/ defendant from the jail, he moved an application under Order 9 Rule 13 of the Civil Procedure Code for setting aside ex-parte decree by contending that for the first time petitioner/defendant got knowledge of ex-parte judgment and decree in February, 1993. The Trial Court though concluded that the petitioner/defendant was not properly served with suit summons, proceeded to reject the application on the ground that petitioner/defendant had not filed any application for condonation of delay when admittedly there was delay in filing application under Order 9 Rule 13.

2. Aggrieved by the order passed by the Trial Court, the present petitioner had filed appeal before District Judge. Before District Judge, two fold submissions were made. 1) In the absence of an application seeking condonation of delay, the application under order 9 Rule 13 could have been allowed by the Trial Court and 2) that there was sufficient cause for the petitioner/defendant

not to attend the Court. The first Appellate Court concurred with the view taken by the Trial Court and has held that though court is possessed of powers to condone the delay, the said power is required to be invoked by the litigant, by moving an application in that regard. Touching other submission about sufficient cause, First Appellate Court has found, on the basis of certified copies of the documents placed on record effecting service on the petitioner/defendant in regard to the notice under Order 21 Rule 22 of the Civil Procedure Code through the Superintendent of Central Jail, that the petitioner had in fact knowledge of passing of Decree on being served with notice, in between 15/3/1991 to 18/8/1992, during which period in which petitioner/defendant was in jail.

3. Learned counsel for the petitioner/defendant has placed reliance on an order passed by the Apex Court in the case of **L/Naik Mahabir Singh V/s. Chief of Army Staff reported in 1990 (Supp) Supreme Court Cases 89(I)** wherein Supreme Court condoned the delay on oral prayer made. The said judgment in the first place does not lay down any ratio and in the second place, it is distinguishable, in as much as no oral prayer was made by the

petitioner before Trial Court or before First Appellate Court, though learned counsel for the petitioner/defendant claims that such prayer was made. Suffice it to say that the statement, that oral prayer was made before First Appellate Court is absent in the petition.

4. Per contra, learned counsel for the respondent/plaintiff has placed reliance on the judgment of learned Single Judge of this court in the case of **Ballumal A. Jaisingh Vs. M/s.J.J. Builders and others reported in 2003(3) Mh.L.J. 238**. Learned Single Judge held that Court is prevented from taking cognizance of any matter if it is barred by limitation. The Court can get jurisdiction only if an application to that effect is made. In the absence of an application, the Court will have no jurisdiction to take up the matter and consequently will have no power to condone the delay. It concluded by saying that action of condoning the delay without any application was an action without jurisdiction and the Trial Court has done so in exercise of jurisdiction which was not vested in it by law. The said view is taken by the learned Single Judge by placing reliance on two judgment of the Apex Court in the cases of **Ramesh Chand Sharma vs.Udham Singh Kamal & Ors. reported in AIR 1999 SC**

3837 and Secretary to Government of India & Ors vs. Shivram Mahadu Gaikwad, 1995 Supp(3)SCC 231. I am of the considered view that even though court has jurisdiction to condone the delay, said jurisdiction/power is to be invoked and when such power is invoked then only court can exercise said jurisdiction. Having regard to the legal position, impugned order can not be faulted. There is no merit in the writ petition. The same is summarily rejected.

5. At this stage learned counsel for the petitioner stated that order of status-quo is operating in this petition since 23rd June, 2004 and said order be continued for a period of eight weeks. Having regard to facts of the present case so also in view of the legal issues that arise for consideration, I continue the order of status-quo for a period of eight weeks.

A.P. DESHPANDE, J.